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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 527

THEO MOSELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 50-51) is reported at 207 F. 2d 908.

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1953 (R. 52), and a petition for rehearing (R. 53-62) was denied on December 10, 1953 (R. 63). The petition for a writ of certiorari was filed on January 7, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in denying petitioner's motion to withdraw his plea of *nolo contendere* on the ground that he had given an involuntary confession, where he had entered such plea after the case had been called for trial, upon the advice of personally selected counsel who at that time was apprised of the existence of the confession.

2. Whether the offense of failing to pay a gambling tax as required by 26 U.S.C. 3290 and 3291 is a misdemeanor which could be charged by information.

3. Whether the information charged an offense.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 10-13.

STATEMENT

On July 9, 1952, petitioner and a co-defendant were convicted, upon their respective pleas of *nolo contendere* (R. 13), in the United States District Court for the Southern District of Florida on count two of an information, which charged that they, being engaged in the occupation, as defined in 26 U.S.C. 3285(b)(1)(C), of accepting "wagers placed in a lottery conducted for profit," "did willfully, during the month of November, 1951, * * * fail to register and pay the special tax required" by 26 U.S.C. 3290 and 3291 (R. 4).[1] At the time

[1] Count one (R. 3), which, except for the element of wilfullness, charged the same offense as count two, was dismissed on motion of the Government (R. 14).

the case was called for trial, July 9, 1952, petitioner, who was present with his counsel, was arraigned and entered a plea of *nolo contendere* (R. 11-13). The following is the pertinent portion of that proceeding (R. 11-14):

> Mr. O'BRIEN: If it please the Court, these defendants have not yet been arraigned. I would like to hold the arraignment at this time. Mr. Watson represents the defendants.
>
> * * * * *
>
> Mr. O'BRIEN: Please listen to the information. (Thereupon the information was read to defendants by Mr. O'Brien). How do you plead?
>
> Mr. WATSON: I ask the Court to accept the plea, under certain peculiar conditions that exist with reference to these two people of a State charge pending against them, I ask your Honor to accept the plea of nolo contendere temporarily and withhold sentence temporarily.
>
> The COURT: I can not do that temporarily, Mr. Watson. It is now or not.
>
> Mr. WATSON: Then I ask your Honor to enter a plea of nolo contendere. I will explain my reasons for it.
>
> The COURT: It will not be necessary to explain your reasons. Do they understand that the Court will sentence them under the plea of nolo contendere the same as if they plead guilty; you have explained that to them.
>
> Mr. WATSON: Yes, your Honor.

Mr. O'BRIEN: The Government will accept the plea, your Honor.

* * * * *

The COURT: * * *.

The order of the Court is that these defendants will be referred to the Probation Officer for pre-sentence investigation, and they will report now to the Probation Officer.

On August 22, 1952, before sentence had been imposed, petitioner and his co-defendant filed a motion for leave to withdraw their pleas of *nolo contendere* and a motion for the production and suppression of their confessions (R. 14-16). It was alleged therein that, shortly before the case was called for trial, petitioner's counsel learned for the first time, through the United States Attorney, that petitioner and his co-defendant had previously given written confessions relative to the case; that after seeing the confessions, he advised them to plead as they did; and that thereafter he conferred with them and was advised that the confessions were obtained under duress (R. 15-16).

On August 27, 1952, at a hearing on the motions, the Government opposed the motion for withdrawal of the pleas on the ground that it had been prepared to go to trial, which was scheduled for the date on which the pleas were entered, and that it would not be "in the best interests of justice" to require the Government to "reassemble the witnesses, the data, and everything else because of information which Mr. Watson could very well have determined prior

to the trial" (R. 19). Petitioner's counsel reiterated the allegations contained in the motion papers (R. 19-20). The trial court, after noting that petitioner's counsel had failed to ask for a continuance at the time he allegedly first learned of the existence of the confessions, denied the motion for withdrawal of the plea (R. 21-22). The trial court further noted that, at the date of petitioner's plea, his counsel, an "astute" and "experienced lawyer," had stated that he intended to defend petitioner and his co-defendant at a trial on a local charge and that he "didn't want the State Court to have access to these confessions or to a judgment of guilt over here" (R. 23, 24).

In denying the motion for suppression of the confessions, the trial court stated (R. 25):

> * * * I haven't seen the confessions, or know anything about them. They are not in my jurisdiction. They haven't been in evidence.

On the same date, petitioner was sentenced to imprisonment for a period of one year and to pay a $2,000 fine (R. 28, 35-36); and his co-defendant was put on probation (R. 27).

On April 1, 1953, the trial court, after a hearing, denied petitioner's motion for rehearing (R. 40-41). On appeal,[2] the Court of Appeals for the Fifth Circuit, after finding no abuse of discretion by the trial court in denying petitioner's motion for withdrawal of his plea and "no reversible error in the record", affirmed (R. 51).

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[2] Petitioner's co-defendant did not seek an appeal.

ARGUMENT

1. Petitioner's contention (Pet. 9-10), that the trial court abused its discretion in denying his motion for leave to withdraw his plea of *nolo contendere,* is without merit. The law is well settled that the issue upon such motion is, not the guilt or innocence of the defendant, but whether the plea was entered in justifiable ignorance of his rights or the consequences of his action, or was the result of fear, coercion, fraud, mistake or inadvertence "such as would justify the court in concluding that it ought not to be permitted to stand." *Friedman* v. *United States,* 200 F. 2d 690, 696 (C.A. 8), certiorari denied, 345 U.S. 926; *Kercheval* v. *United States,* 274 U.S. 220, 224; *United States* v. *Shneer,* 194 F. 2d 598, 600 (C.A. 3); *Williams* v. *United States,* 192 F. 2d 39, 40 (C.A.5).[3]

Petitioner has shown no such circumstances. He was represented by a personally selected counsel, whose competency the trial court recognized and he himself does not challenge. He does not dispute that his plea was voluntarily made. The record clearly shows that it was made unconditionally, for the trial court specifically refused to enter it "temporarily." It was accepted only after petitioner's counsel told the court that petitioner understood that he would be sentenced thereon. Petitioner's asserted reason for entering a *nolo contendere* plea,

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[3] The fact that petitioner's motion for withdrawal was made before sentence had been imposed did not give him any greater right to a withdrawal of his plea. See *Williams* v. *United States,* 192 F. 2d 39 (C. A. 5); *Goo* v. *United States,* 187 F. 2d 62 (C.A. 9), certiorari denied, 341 U.S. 916; *United States* v. *Colonna,* 142 F. 2d 210 (C.A. 3).

as the trial court found, was his desire to keep his confession and judgment of guilt in the federal court from becoming available to the state court, where he expected to go to trial. Thus, the entry of his plea in the federal court was calculated strategy to risk the consequences of a conviction therein in the hope of acquittal in the state court.[4] Significantly, counsel did not ask for a continuance on the ground that, having just learned of the confession, he needed time to investigate the circumstances. There is therefore no substance to petitioner's claim that entry of the plea was the only manner of gaining time to determine the validity of the confession.[5]

2. Petitioner's contention (Pet. 10-12), that the information upon which he was convicted was void as charging a felony, is frivolous. The information charged petitioner with willful failure to register and pay the special tax required under 26 U.S.C. 3290 and 3291. Section 3294(c) applies to such willful violations the penalties prescribed in 26 U.S.C. 2707. The relevant portion of section 2707 is subdivision (b), which relates to the payment of special taxes and specifically defines as "a misdemeanor" the offenses embraced therein. See *Spies* v. *United States,* 317 U.S. 492. Clearly 26 U.S.C. 2707(c), upon which petitioner relies (Pet. 12), is

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[4] The reversal of petitioner's state court conviction (See Pet. 15-18) is clearly no evidence that petitioner's plea was not knowingly made.

[5] Since petitioner's conviction was not predicated upon the confession but upon his voluntary plea, the trial judge was not required, on the motion for withdrawal, to adjudicate the voluntariness of the confession. And since petitioner admits (Pet. 14) that his confession was made before he was arrested, it is clear that the rule of *McNabb* v. *United States,* 318 U.S. 332, would have been inapplicable.

inapplicable, for it explicitly applies to persons, such as employers and others, who are required "to collect, account for and pay over" certain taxes, as distinguished from persons required to pay such taxes in the first instance. Cf. *Kellems* v. *United States*, 97 F. Supp. 681 (D. Conn.).

3. The information charges, in plain and concise language, all the essential elements of the offense, namely that petitioner, being a person required to register and pay a special tax under the statute, wilfully failed to do so during November 1951. It does not, as petitioner claims (Pet. 19-20), charge as an offense an act occurring prior to the effective date of the statute, which was November 1, 1951. See Section 472 of the Act of October 20, 1951, 65 Stat. 531-532. The information charged failure to pay such tax "during the month of November, 1951", i.e., after November 1.

The argument that the information is duplicitous in charging both failure to register and failure to pay the special tax amounts to a complaint that petitioner has been sentenced for one offense when he might have been sentenced for two. Since the allegations are joined conjunctively, the information is not duplicitous. See *Crain* v. *United States*, 162 U.S. 625; *District of Columbia* v. *Hunt*, 163 F. 2d 833, 838 (C.A.D.C.); *Price* v. *United States*, 150 F. 2d 283, 284-285 (C.A. 5); *Troutman* v. *United States*, 100 F. 2d 628, 631 (C.A. 10); *Poffenbarger* v. *United States*, 20 F. 2d 42, 48 (C.A. 8).[6]

[6] The constitutionality of the statute involved herein has been upheld by this Court too recently to require any discus-

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH, 1954.

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sion of petitioner's attack (Pet. 18-21) on it on such grounds. *United States* v. *Kahriger*, 345 U.S. 22. See also *Combs* v. *Snyder*, 101 F. Supp. 531 (D.D.C.), affirmed, 342 U.S. 939. Since the statute clearly is prospective in its operation, his attack (Pet. 19-20) on the ground that it is *ex post facto* is without merit.

APPENDIX

26 U.S.C. [Supp. V] 3285, which is part of Subchapter A of Chapter 27-A of the Internal Revenue Code, provides in pertinent part:

(a) *Wagers.*

There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) *Definitions.*

For the purposes of this chapter—

(1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers-game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

26 U.S.C. [Supp. V] 3290, which is part of Subchapter B of Chapter 27-A of the Internal Revenue Code, provides:

Tax.

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C. [Supp. V] 3291, which is part of Subchapter B of Chapter 27-A of the Internal Revenue Code, provides:

Registration.

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district——

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

26 U.S.C. [Supp. V] 3294, which is part of Subchapter B of Chapter 27-A of the Internal Revenue Code, provides in pertinent part:

(c) *Willful violations.*

The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter.

26 U.S.C. [1946 ed.] 2707 provides in part as follows:

(b) Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter who willfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(c) Any person required under this sub-

chapter to collect, account for and pay over any tax imposed by this subchapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, together with the costs of prosecution.

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